BEFORE THE STATE WATER RESOURCES CONTROL BOARD

In Re: North Coast Regional Water Quality Control Board CAO No. R1-2006-0058	Case No. JOHN E. DIEHL'S PETITION FOR REVIEW, REQUEST FOR STAY, REQUEST FOR HEARING, AND REQUEST TO SUBMIT ADDITIONAL EVIDENCE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

Petitioner John E. Diehl pro se submits this Petition for Review pursuant to California Water Code Section 13320 and Title 23, California Code of Regulations, §2050, incorporating herein a request for stay pursuant to §2053, a request for hearing pursuant to §2050.6(3)(b), and a request to present additional evidence pursuant to §2050.6. Petitioner may amend this Petition with further evidence, argument, and authorities as appropriate.

1. Petitioner: The petitioner herein is: John E. Diehl, 679 Pointes Dr. W., Shelton WA 98584, 360-426-3709.
2. Order for which review is sought: Petitioner asks review of Cleanup and Abatement Order No. R1-2006-0058 ("Order"), issued by the California Regional Water Quality Control Board, North Coast Region ("Regional Board"),[1]. A copy is attached.
3. Date of Order: The Order is dated May 10, 2006.
4. Statement of reasons the action was improper:

Petitioner is charged with an act of pollution that he did not commit and for which, as a lender, he bears no responsibility or liability under California and federal law. The applicable laws are intended to assign responsibility for pollution to those who have a role in causing it. Public policy should be aimed at deterring those who would pollute, not those who would lend. To make scapegoats of lenders is morally reprehensible and legally untenable, ignoring the distinction between acts of wrongdoing that cause pollution and acts of lending that may contribute to solutions. Because the Order fails to name the appropriate responsible parties, because it erroneously names as a discharger a lender who had no connection to the discharge and who has undertaken to dispose of the property expeditiously, and because its findings do not support its decision, it is fundamentally flawed.

I will reserve to Section 7 below the main discussion of legal issues, and will here focus on facts that were omitted or distorted in the Order's findings. Because of some inevitable overlap, I incorporate here by reference the entirety of Section 7, and incorporate there by reference the entirety of this section.

A. **The Board has erroneously and arbitrarily failed to direct its Order at the actual dischargers.**

Although Robert M. "Mike" Bliss and other members of his family played a central role in causing the existing problem, the abatement order studiously avoids discussing their responsibility. Beginning in 1976, the family of Loren C.Bliss owned and operated the lumberyard and hardware store where leaking underground storage tanks were removed prior to its sale to L.C. Bliss and Sons Livestock Corporation Employee Stock Ownership Trust. See Exhibit 17, p1. Instead of naming members of the family as dischargers, the Order only names myself and several dissolved corporations.

Based on my personal observations as an occasional customer, Loren Bliss's son, Mike Bliss, was in day-to-day charge of the lumberyard and hardware store for most of the 15 years

[1] The Order is signed by Catherine E. Kuhlman, Executive Officer, apparently under authority delegated to her by the Board. Even though the Board apparently has no direct knowledge of this action, and even though the Executive Officer may only be signing off on staff work, I will refer to the Order as the work of the Board, which remains responsible for it.

between 1976 and 1991 when I resided in Del Norte County. Appendix A, Affidavit of John E. Diehl ("Affidavit"), proposed Exhibit 19, ¶10. According to a report dated May 7, 2003, to Tuck Vath from Lisa Bernard (both staff members of the Regional Board),

> Three USTs were installed at the west portion of the site some time prior to 1976. In 1976, Mike Bliss purchased the building supply facility from Bruno Brunell. Mr. Bliss removed two of the three USTs in 1989. . . . The Employee Stock Ownership Trust (ESOT) purchased the property on September 1, 1994 from Mr. Bliss.

Exhibit 17.

As a precondition of sale of their property, the Blisses signed an environmental indemnification agreement, by which they agreed to discharge all damages in connection with the property to the extent they arose from activity, emission, threatened emission or environmental condition that occurred or was in existence during the period of their ownership. Exhibit 3, p. 3, ¶3.a. Within the recitals, the Blisses acknowledged that they were the holders of all issued and outstanding shares of the company they were selling. *Op.cit.*, p. 1. They also acknowledged that they and directors and officers selected by them "have managed the daily operation of the company for many years." *Id.*

Plainly, the Blisses were admitted owners and operators of the facility at a time when underground storage tanks leaked. As such they were responsible parties and dischargers, and ought to be held accountable for their negligence regarding the tanks. Additional issues relating to their liability are discussed in Section 7 below.

A. The Board has erroneously and arbitrarily named Petitioner as a discharger.

I have not discharged any petroleum-tainted waste, nor do I threaten to do so. My only connection with the contaminated soils stockpiled on the site of the Square Deal Lumber property, as the Order acknowledges, is as owner by virtue of foreclosure of a loan I made in 1996 to the ESOT that had acquired L.C.Bliss and Sons Livestock Corp. The Order presents no evidence that I have discharged pollutants to groundwater or that I threaten to do so. Moreover, it fails to present a fair and balanced account of my efforts to protect my security interest following the default on this loan and subsequent bankruptcy petition by the ESOT. The Regional Board's second guessing of my business judgment seven or eight years after the fact deserves no weight or consideration.

Since my purpose in making the loan is germane to the Order, and specifically to the issue of whether I qualify for the protection from liability generally granted to lenders under §25548.2 of the Health and Safety Code (as well as the corresponding Federal lender's exemption), I will provide here an account of how and why I acquired the security interest involved in this case and similar security interests by means of other loans. Second, I will show how my conduct conformed to the statutory requirements to undertake to dispose of foreclosed property expeditiously in order to qualify for the lender's liability exemption. Finally, I will describe the market conditions that have so far made unsuccessful my efforts to sell the collateral property for a fair consideration.

(1) Petitioner functioned as a lender on the Square Deal property, not a discharger.

My professional background was in education – I taught philosophy for several years at the University of Nebraska and University of Minnesota – and as an environmental consultant – working with consultants to the Department of Fish and Game in preparation of a management plan for the Smith River as part of the State's Wild and Scenic Rivers program and with an engineer in preparation of environmental impact reports.

This background does not tend to qualify me or tempt me to become an entrepreneur. Still, like anyone with savings, I have tried to find ways to derive income from my savings that hopefully would more than offset the effects of inflation. Although I have never been in business as a lender -- I don't advertise or maintain an office, for example -- I have made over a hundred loans or purchases of existing notes secured by deeds of trust in the past two decades, using such loans as a means to earn interest income. My loans in California were all made through brokers.

There is a basic difference, not always understood, between most institutional lenders and most private lenders. Institutional lenders tend to put primary emphasis on the creditworthiness of the potential borrower. They have high standards, and so may expect relatively few defaults and foreclosures. They are normally also reluctant to lend on illiquid property, preferring to concentrate on loans collateralized by residential property in stable neighborhoods. To the extent that they focus on the cream of borrowers and demand relatively liquid collateral, they can afford to offer relatively low interest loans and to accept a high loan-to-value ratio (with residential property sometimes even exceeding 95% of appraised value). Consequently, they expect few foreclosures and an ability to quickly dispose of those few properties acquired through foreclosure.

Private lenders, on the other hand, are typically left with less creditworthy borrowers and less liquid collateral. They try to compensate by charging higher interest rates and by being patient enough to accept a protracted period of marketing for the less liquid collateral property that they acquire when loans go bad.

While I cannot speak for all private lenders, this general description fits my own experience. Of the more than 100 loans I have made, I can recall nine where I acquired the collateral through foreclosure. Affidavit, ¶3. Although this means that the vast majority of my loans have been successfully repaid, the nine foreclosures would be an unacceptably high rate of foreclosure for most lending institutions. In every case, I have sold property so acquired as expeditiously as I could, given market conditions and my desire to recover what I am owed. I do so, because I have no desire to own such property as an investment, even when I am not obliged, as in the instant case, to dispose of it as expeditiously as possible, subject to the requirement that I not turn down any bonafide offer to purchase for a "fair consideration." (Only the Square Deal property, among the several foreclosures with which I have had experience, has had any sort of contamination of which I am aware.)

Many of the loans I made were secured by residential property or vacant land; some were secured by commercial property. The market for commercial real estate, whether developed or undeveloped, is very different than the market for most residential real estate. In general, residential real estate is considerably more liquid, i.e., it can be more readily sold. This generalization may be made more emphatically in small towns like Crescent City, even to the extent that institutional lenders have been known sometimes to shun making loans backed by commercial real estate in such locations.

Yet, even residential real estate can go through troughs following a default and

foreclosure. A lender then must either take a significant loss on a relatively quick sale or be prepared to retain the property for a longer period, hoping for market recovery. For example, a loan I made in 1990 was collateralized by a house in northeast Sacramento. It went into default, I was not able to work out a rescheduling of the debt with the borrower, and I foreclosed on the property in 1992. By the time I foreclosed, Sacramento was experiencing a sizable downturn in real estate values, brought about by the closing of a major air force base as well as other factors. I tried to sell the property quickly, but could not get a solid offer above $100,000 for a house that two years previously had been appraised at $135,000, and on which I was owed significantly more than $100,000. Affidavit ¶4. So, I maintained the place while waiting for a market recovery that would at least allow me to avoid a loss. It was not until 2001 that the market recovered enough for me to sell, getting more or less the equivalent of what is called a "fair consideration" in the Health and Safety Code.[1] I have not calculated whether the amount I received in selling this property amounted to as much as fair consideration, but retained the property only until it appeared to me that I could come reasonably close to realizing a fair consideration. If I had been interested in the property except as a means of protecting my security interest, I might not have sold so quickly once prices had recovered from the earlier downturn, for there were signs that the real estate boom, propelled by low interest rates, would continue. But I have never regarded loans as a means to acquire property as an investment.

In the case of the loan involved in the instant case, I was approached in the spring of 1996 by Lyndol Mitchell, owner and broker of Ming Tree Realty in Crescent City, who was trying to arrange a loan to the owners of the Square Deal Lumberyard. The owners had purchased the property from the Bliss family in 1994, but had been unable to operate it profitably and had shut it down, opening a new building supply facility in Reno, Nevada. The manager, Jeffrey Frank, explained to me that he was lining up long-term financing for his inventory and other operational needs, but that he needed a bridge loan to carry him until the long-term financing could get final approval. Affidavit ¶5. He presented evidence of interest by an institutional lender in providing the inventory financing he sought, as well as a financial statement that appeared to show that the business was solvent and not on the verge of collapse. See proposed Exhibits 20 and 21.

I learned that leaking underground storage tanks had been recognized as a problem at the time the ESOT acquired the property, but was assured by both the borrower and the former owner, Mike Bliss, that this problem was in the process of being addressed. Affidavit ¶5. I was provided with a copy of the indemnification agreement by which the Bliss family promised to pay for the cost of cleanup and abatement. Exhibit 3. My loan of $560,000 was secured by 11 parcels: six contiguous lots on Northcrest Drive, just outside of the city limits; three lots in two

---

[1] Throughout I use the term "fair consideration" as it is defined in the Health and Safety Code. Under the §25548.5(l)(1)(A), "Fair consideration" means -- paraphrasing -- the sum of the outstanding principal owed to a lender immediately preceding acquisition of title pursuant to foreclosure, plus unpaid interest and penalties, whether arising before or after foreclosure, plus reasonable and necessary costs incurred by the lender in protecting and preparing the property prior to sale, less any amounts the lender receives from any partial disposition of the property, from maintaining business activities, or as payments by the borrower.

blocks north of the lumberyard; and two lots encompassing the block on which the lumberyard was located (the smaller of which included a house where Mrs. Dorothy Bliss, mother of Mike, had been granted a life estate at the time the Blisses sold out to the employee stock ownership trust). Exhibits 1 and 2.

(1) **Following foreclosure, Petitioner undertook to dispose of the collateral property expeditiously.**

After three payments in 1996, the loan went into default. I started foreclosure proceedings, which were blocked by a bankruptcy filing. Affidavit ¶6. Because the bankruptcy trustee was not taking care of the collateral property and not even paying property taxes on it, I felt I needed to try to protect my security interest by seeking relief of stay and proceeding with the foreclosure. *Id.* Even before the trustee's sale in January 1998, I had made contact with Mike Bliss, former owner of Square Deal Lumberyard, to try to persuade him to buy out my note and/or to resume the cleanup at the lumberyard. *Id.* At the sale, I deliberately had the trustee bid an amount substantially less than the amount owed me under the terms of the note in the hope of quickly recovering most of what I was owed and avoiding the problems associated with taking possession of the property. I urged at least one real estate broker in Crescent City to recruit potential buyers for the sale, letting them know that it would be available for less than the full amount I was owed. *Id*. My bid was at least $127,564.51 less than the amount owed. See Exhibit 4 and calculation in Section 7 below.

When I acquired the property despite my underbid, I simultaneously attempted to repair the effects of vandalism that had occurred during the period of neglect and to find potential buyers. It did not make sense to list the property immediately, for there was a problem with the title. My loan had been backed by title insurance insuring that I had a first deed of trust. Yet, the trustee's sale guarantee showed a prior deed of trust still representing a lien on the property. Even before the sale, I had attempted to clear up the confusion, which was apparently created by the failure of a title company in Oregon to record a reconveyance affecting the collateral property. It took months after the trustee's sale for the trustee, Mesa Verde Financial, Inc., dba Preferred Trustee Services, working with a title company in Crescent City, which in turn had to work with the title company in Oregon, to obtain the needed reconveyance and then to record the Trustee's Deed upon Sale, which was recorded September 8, 1998. Affidavit ¶8.

I spent more than $9,000 in making the buildings on site more presentable. Affidavit ¶9 and Exhibit 18. Meanwhile, I did what I could to interest those I judged the most likely prospects to purchase the property. I approached lumberyards in nearby communities, ranging from Gold Beach to Eureka, and even farther afield, to see whether they might have an interest in purchasing the property to open a store in Crescent City. Affidavit ¶11 and proposed Exhibit 23. (Because by that time Crescent City was reduced to a single lumberyard serving the entire county, and because the buildings had been designed and used specifically for retailing lumber and hardware, it seemed to me reasonable to try to interest such businesses in buying the property.) During this time I also began an effort to attract potential buyers by listing the property for sale on the Internet. *Id*.

I devised a notice advertising the property, which I sent to several prospective buyers, offering to sell the "downtown" properties -- consisting of the block containing the Square Deal lumberyard and hardware store, the two parcels in the block to the north between 5th and 6th St., and the full block between 6th and 7th St. -- for $780,000 **and** to complete the site cleanup as part

of the transaction. See proposed Exhibit 22. While I would not have recovered a fair consideration by that sale alone, given the prospective expense of a cleanup, I hoped that I might eventually sell the remaining property for enough to cover what I was owed under the terms of the loan.

Although in 1998 I was not successful in getting anyone to make an offer on the whole of the Square Deal property, I did receive and accepted an offer for the largest of the vacant parcels. Richard Brown made an offer of $239,200 on December 26, 1998 for A.P.#118-160-01, consisting of the block between 6th and 7th St. His offer was contingent on obtaining financing and ultimately depended on Mr. Brown's obtaining a contract from a federal or state agency for construction of a building on the site. See Exhibit 6. When he was unable to win the contract, he was unable to obtain financing, and so did not close escrow. Affidavit ¶12.

I saw enough interest by some of those with whom I had spoken that by the end of the year, when I arranged to list the property with the Crescent City real estate broker who had originally persuaded me to take the loan, I excluded eight prospects from the listing agreements, allowing me to sell to any of them without incurring a commission. See Exhibit 5. (Of course, saving a commission does not usually mean savings to the seller, since the buyer will adjust his offer accordingly, but it does tend to promote a sale by encouraging the buyer to think that he can get the property at a reduced price.)

The listing agreements covering the collateral property, both the contaminated site and the uncontaminated vacant lots, were formally completed with Ming Tree Real Estate on January 8, 1999, though I had been working with the broker and owner, Lyndol Mitchell, to try to line up one or more buyers even before the foreclosure was complete. Affidavit ¶13. The listing prices were those recommended by the broker, representing his notion of a reasonable price, at or below fair market value. *Id*. There were separate agreements covering (1) six contiguous parcels on Northcrest Drive, (2) two parcels located on K St. between 5th and 6th St., and (3) two parcels comprising the block between 4th and 5th St., improved by the Square Deal main building and two houses. See Exhibit 5 and Affidavit ¶13. (The remaining parcel, consisting of the block between 6th and 7th Streets, was at that time tied up by the accepted offer from Richard Brown. Exhibit 6)

I have continued my efforts to find buyers for the property. With one exception, I have never received an offer for the whole of the collateral property. Instead, I have mainly received offers for various parts.

Jim Relaford "or nominee" made an offer in March 1999 . I rejected the offer, but made a counteroffer, to which he made a counteroffer, which I rejected. Neither of his offers qualified as "bona fide and firm offers of fair consideration," as these are defined under §25548.5(l) because (1) they were not cash offers, and (2) they were not high enough to represent fair consideration for the collateral property. Compare Exhibits 7 and 15. Because Mr. Relaford appeared to be seeking an agreement that would tie up the property without agreeing to any earnest money that would be paid to me if he failed to perform, I also believe these offers were not "firm" within the meaning of the statute. See Exhibit 7 and Affidavit ¶15.

In March 2000 I rejected an offer for the whole of the collateral property from Valerie Barth "and/or assign." It was not a bona fide and firm offer of fair consideration because (1) it was not for cash, and (2) it was not high enough to represent fair consideration. (I would have had to carry all but $1,000 cash down payment on the $700,000 offer, meaning that I would have

held a note for $699,000.) Compare Exhibits 8 and 15.

In April 2001 I accepted an offer from Mac and Karen Robertson for purchase of the two parcels between 5th and 6th St. on K St. The offer was subject to the buyer obtaining a financing package and permits for an automotive repair business. The Robertsons did not close escrow. I was told that they were unable to obtain the financing package they sought. See Exhibit 9 and Affidavit ¶17.

In January 2003 I accepted an offer from Chetco Federal Credit Union for half of the block between 6th and 7th St. The property sold in March 2003. See Exhibit 10.

In September 2003 MP Financial Group, Ltd, accepted my counteroffer for the parcel containing the lumberyard and hardware store for $450,000. Exhibit 11. The agreement would have required a lot line adjustment by which the residential structures on the block would be segregated and not sold. The offer was subject to a 45-day review during which the buyer might "determine in its sole discretion" whether to proceed or to terminate the purchase agreement without liability. The buyer terminated the agreement without explanation. Affidavit ¶19.

In August 2004 I accepted an offer from California Imperial L.L.C. for two parcels on Northcrest Dr. and parts of two other contiguous parcels. See Exhibit 12. The buyer was granted 150 days after acceptance to complete his investigation, and then was granted an additional 30 day extension. In December 2004 California Imperial assigned its rights to Redwood Imperial L.L.C. The latter canceled the purchase agreement. Affidavit ¶20.

In January 2005 I sold the remaining half of the block between 6th and 7th St. to Chetco Federal Credit Union. See Exhibit 13.

In April 2005 I rejected an offer from the Littlefield Trust for the block between 4th and 5th St., including the Square Deal building and grounds. Exhibit 14. The offer failed to qualify as a "bona fide and firm offer of fair consideration," because it was not for cash and was also not "solely" for the collateral property, since it was contingent upon my providing a service by assuming responsibility for the contaminated soils cleanup. Also, if I had agreed to accept financial responsibility (as well as every other contractual obligation entailed by contracting to complete the cleanup), the net consideration to me appeared likely to be substantially below fair consideration, based on rough estimates of cost obtained from an engineer familiar with the problem. Affidavit ¶22.

In April 2006 I rejected an offer from Land Value Group of Beaverton, Oregon for A.P. 118-160-03. See proposed Exhibit 26. The offer of only $2,000 failed to qualify as a bonafide offer of fair consideration because it was far below an amount equivalent to a fair consideration. Affidavit ¶23.

Although there have been a number of inquiries about the property, both before and after the most recent offer, only those described above resulted in formal offers for the property. While I would be glad to sell the remaining property in its entirety, the most practical course appears to be to sell it piecemeal as buyers become interested in particular lots.

(1) **Market conditions have not allowed Petitioner to dispose of the Square Deal Property to obtain the fair consideration he is entitled to seek.**

Although the lender's liability exemption requires attempting to dispose of property acquired through foreclosure expeditiously, it does not require a lender to dispose of property quickly if that means settling for less than a fair consideration.

In the case of the Square Deal property in Crescent City, I believe there were several factors that have made it difficult to sell it in the eight years since foreclosure. Although it is rarely possible to know exactly why a potential buyer did not make an offer or made only an offer significantly below a fair consideration, some generalizations are applicable.

The largest obstacle to selling the Square Deal property has been the petroleum-contaminated soil on site. No one has been able to assure me of how much it might cost to remove this contamination and to clean the property to the satisfaction of the Regional Board. I believe those seriously interested in purchasing the property have all, up to now, shared my concern not to accept unlimited liability, a liability they fear would be theirs if they purchased the property in its present condition. No investor or entrepreneur has been brave enough to pay a fair consideration and incur such potential liability. So, while this is not the only factor, the largest single cause that I have not been able to sell the property for a fair consideration is that the Regional Board has not required the Blisses to complete the cleanup they began.

But there were other factors, as may be inferred from the fact that even the vacant, uncontaminated lots have not been quick to sell. One of these was a lingering drop in real estate values brought about by overbuilding that occurred at the time of construction of Pelican Bay Prison, which caused a "boom" of sorts for several years in the local real estate market, but which led to a lack of demand when construction concluded. Affidavit ¶24.

A second factor was the long-term loss of employment in the backbone of the local economy, the lumber and fishing industries. The last mill operating in Del Norte County closed during the '90s. Affidavit ¶25.

A third factor, particularly affecting the lumberyard, was the existence of a vigorous competitor. Another lumberyard/hardware store had played a significant role in driving the Square Deal lumberyard out of business in Crescent City (causing its owners to open a facility in what they believed was a more promising market in Reno). To some extent the presence of this successful competitor in a small town intimidated potential buyers who might otherwise have been tempted to revive the Square Deal lumberyard. Affidavit ¶26.

A fourth factor was the problem of acquiring needed sewer connections for development. This problem especially afflicted the lots on Northcrest Drive that were originally in the county, but have now been annexed to the city. For a period of several years, there was a cloud over any commercial development that required new sewer connections. Real estate brokers with whom I periodically discussed the local market expressed concern about what the relative unavailability of sewer connections was doing to the local economy. Affidavit ¶27.

A fifth factor was a negative attitude of city officials, particularly toward the Square Deal building. Mr. Mitchell, the broker, told me that on at least one occasion the former city manager gratuitously expressed his opinion to a potential buyer that the building had so many problems that it ought to be torn down. Those more knowledgeable than the former city manager, who has not, so far as I am aware, ever inspected the building, have concluded otherwise. Still, his attitude tended to discourage those who hoped to develop a business in the Square Deal building. Affidavit ¶28.

A sixth factor was the life estate that had been granted to Mrs. Bliss for the house adjacent to the retail store. This presented a complication not only because Mrs. Bliss had the right to retain control of the house and yard for the remainder of her life, but also because there was only one sewer connection that was shared by Mrs. Bliss's house, a smaller residential unit,

and the building that housed the lumberyard and hardware store. A buyer purchasing the property would have needed either to work out an arrangement with Mrs. Bliss or to have purchased at least one additional sewer connection from Crescent City and torn up the street to install it. Until Mrs. Bliss died in 2003 her life estate made the property less attractive to potential buyers. Affidavit ¶29.

A seventh factor, and certainly one of the most important, was the opening of a Wal-Mart store in Crescent City in the early '90s. I have now observed the impact of Wal-Mart on three small towns, in Crescent City, in my hometown of Newton, Iowa, and in the town nearest where I now live, Shelton, Washington. In each case – and elsewhere generally – the opening of a Wal-Mart in a small town has had profound and long-lasting consequences for downtown retailing. The immediate effect is to drive some stores out of business. The intermediate effect is to create empty store fronts downtown. Even when the local economy is not otherwise stressed, Wal-Mart causes local retailers and would-be retailers to hesitate and not to risk an investment that would entail in part competing with Wal-Mart. The impacts linger for ten years or more, though eventually most communities appear to adjust by creating a different mix of retailers and a different distribution of commercial development. Affidavit ¶30.

I believe these considerations explain why I have received no offers of fair consideration for the lumberyard and have only succeeded in selling two parcels -- what was originally one parcel -- from the remaining uncontaminated collateral property. Certainly it is possible to conjecture that the property might have been sold more expeditiously by following some other course of action. But no one can know that any alternative would have been better in expediting sale in a way consistent with protecting my security interest. The law does not require that a lender attempting to protect a security interest must sell collateral property for less than a fair consideration in order to achieve an expeditious sale. When marketing illiquid property like that involved here, there is no sure path both to sell the property expeditiously and to salvage something close to a fair consideration in the sale. Monday morning quarterbacking is easy, but it doesn't win any games. As a lender with experience since 1986 in making loans backed by real property, I have judged that I could best protect my security interest through the actions I have undertaken. My efforts in attempting to dispose of the property in a way that at least came close to protecting my security interest were reasonable even if the results have not been satisfactory to me or to city officials that would like to see the property occupied by a business generating sales tax revenues. It is certainly not evident that any other course of action than that which I undertook would have been more successful in disposing of the property expeditiously and at or close to a price that represented a fair consideration.

5. How Petitioner is aggrieved.

I am aggrieved that the person primarily responsible for the contamination created by the leaking underground storage tanks has not been named as a discharger. I am aggrieved by being named as a discharger, and facing potentially hundreds thousand dollars in liability, even though I was not responsible for discharging even the least amount of contaminants, and even though I qualify for exemption under §25548.2 of the Health and Safety Code and similar protection under federal law. I am aggrieved that if this attack on me is successful, it will mean not only that the person actually guilty of wrongful conduct will not be held liable, but also that private lenders, including institutional lenders, will be frightened away from making loans secured by property

that may have some contamination from leaking underground storage tanks, and so shift the cost of cleanups more to the public.

Despite the fact that I made my loan to the ESOT only after the leaking underground storage tanks were removed and after the former owners had promised to complete the clean-up, I have been inaccurately and unfairly labeled as a discharger. If, notwithstanding the lender's liability exemption contained in §25548.2 of the Health and Safety Code, I were deemed liable, I would face costs estimated by an engineer as between $150,000 and $300,000. See Affidavit ¶32. Given the antipathy to my circumstances displayed by the Regional Board's staff and the considerable discretion they enjoy, I have reason to fear that my expenses might exceed even the high end of the range estimated.

6. The action Petitioner requests the State Water Board to take

The Board should add the name of Robert M. Bliss and other signatories to the indemnification agreement to its list of dischargers. Depending on the outcome of further investigation, it should add the name of "Bruno" Brunell. It should remove my name.

7. Points and authorities for legal issues

A. **The actual dischargers have been arbitrarily and improperly omitted from the list of named dischargers.**

Parties are to be named for cleanup at a site if there is "credible and reasonable evidence which indicates the named party has responsibility." *In the Matter of the Petition of Exxon Company*, Order No. WQ 85-7 (1985), p. 17. Given the evidence of their own recitals in their indemnification agreement there is no doubt that the Blisses are responsible parties. See Exhibit 3.

Under §25323.5(a)(1) of the Health and Safety Code "responsible party" or "liable person" means those persons described in section 107(a) of 42 U.S.C. §9607(a), a section of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").Under this section operators of facilities with leaking underground storage tanks are responsible parties. The U.S. Supreme Court has explicated the term "operator": An operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility. To sharpen the definition for purposes of CERCLA's concern with environmental contamination, an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations. *United States v. Bestfoods*, 113 F.3d 572 (1998). Even if the Blisses did not admit to being owners and operators, by the definition of "operator" they plainly were operators of the site.

The fact that the Blisses held ownership through a corporation does not protect them from liability. A person who is an operator of a facility is not protected from liability by the legal structure of ownership. *United States v. Kayser-Roth Corp.*, 910 F.2d 24, 26 (1st Cir.1990), cert. denied, 498 U.S. 1084 (1991). Federal law is relevant because the existence of federal statutes regulating pollution liability requires that California law, if it is not to be deemed preempted, to be consistent with federal law, and because California's definition of "responsible party" and "liable person" in the Water Code adopts the federal definition. CERCLA has been held to prevent individuals from hiding behind the corporate shield when, as operators, they themselves

actually participate in the wrongful conduct prohibited by the Act. *Riverside Market Dev. Corp. v. International Bldg. Prods., Inc.*, 931 F.2d 327, 330 cert. denied, 502 U.S.1004 (1991), cited in *Bestfoods, supra*. Plainly, the Blisses are liable as dischargers, both as owners and operators.

The status of the previous owners, identified in the Order as Bruno and Vittoria Brunello, is less clear. The Order does not provide sufficient evidence to determine whether a discharge occurred during the period of the Brunellos' ownership and operation of the site, though they apparently installed the underground storage tanks that leaked. Because of the incompleteness of the Order and the superficiality of the investigation that preceded it, it is possible that a more thorough investigation would uncover evidence to establish whether Bruno and/or Vittoria Brunello were responsible for the leaks.

Even if there were a dispute about the responsibility of the Blisses, at least they should be named as potentially responsible parties. As the State Board has observed, public policy considerations dictate naming multiple responsible parties in cases of disputed responsibility. *In the Matter of the Petition of Stinnes-Western Chemical Corporation*, Order No. WQ 86-1 (SWRCB 1986), p.19. In cases involving several potentially responsible parties, it is appropriate to name in cleanup orders all parties for which there is reasonable evidence of responsibility. *In the Matter of the Petition of Exxon Company*, Order No. WQ 85-7 (SWRCB 1985), p. 17. See also *In the Matter of the Petition of U.S. Cellulose*, Order No. WQ 92-04 (SWRCB 1992), p. 4.

A. **Petitioner is not a "responsible party" or "liable person" under California and federal law.**

While an owner is ordinarily considered a "responsible party" or "liable person" under the federal definition adopted through Health and Safety Code §25323.5(a)(1), there is an important exception stated in 42 U.S.C. §9607(b),

> There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by . . . an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions. . . .

Because the Order does not allege that any releases or threats of releases of hazardous substances have occurred except through leakage of underground storage tanks on the Square Deal site, because none of the people involve in owning or operating these were agents or employees of mine, because the tanks had been removed and contaminated soil safely stockpiled on site before I acquired any control over the site, and because I had no control over any operations at the site until I acquired indicia of ownership at the trustee's sale in 1998, there is no basis for concluding that I am either a responsible party or a liable person under California or

federal law.

A. **Petitioner is not a "discharger" as defined by Water Code §13304 and 23 C.C.R. §2601.**

The Regional Board may issue cleanup and abatement orders to any person "who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state." Water Code §13304(a). "Discharger" is defined as "any person who discharges waste which could affect the quality of waters of the state." 23 C.C.R. §2601. However, where there is no causal link between a discharge and a person named as a discharger there is no legal basis for holding a person so named as a responsible party. As the court ruled in *City of Modesto Redevelopment Agency v. Superior Court*, 119 Cal. App. 4th 28 (2004), p. 44, "… [W]e see no indication the Legislature intended the words 'causes or permits' within the Porter-Cologne Act to encompass those whose involvement with a spill was remote or passive."

I am not a discharger as so defined. I did not own the Square Deal site until January 1998, when I foreclosed on the property in order to resell it to offset the financial losses arising from default on a loan I made to L.C.Bliss and Sons Livestock Corporation. According to the Order, the last of three underground storage tanks, alleged to be the source of petroleum discharges, was removed by the Bliss family in June 1995 (Findings, ¶4). The Order alleges that 1250 cubic yards of contaminated soil were removed in October 1996 near where the tanks had been buried (Findings, ¶6). This soil was safely stockpiled covered by a tarp, not under an awning as ¶6 alleges, but under the roof of a shed enclosed on three sides and having a paved floor. See Proposed Exhibit 25. All of the evidence of contamination presented in the Order relates to times either before or when the contaminated soils were excavated and stored. The soils have not been tested subsequently.

The fact that a decade ago contaminated soils were removed and safely stored more than a year before I foreclosed on the property does not license the inference that there has been any subsequent discharge or that any is threatened. As the administrative agency issuing the Order, the Regional Board "must set forth findings to bridge the analytic gap between raw evidence and ultimate decision or order." *Topanga Association for a Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506, 515 (1974). It has failed to do so. The Order does not produce evidence that I in any way caused or permitted the discharge or that any discharge is threatened or proposed. In fact, ¶10 of the Findings acknowledges that I was named in the order simply because I am the current owner. There is no finding that there was any discharge after the removal of the contaminated soils, that there is any ongoing discharge, or that there is any probability of future discharge. No findings of fact support any conclusion that the current condition of the site poses a significant environmental hazard. Consequently, labeling me as a discharger within the meaning of the statute and regulation is unsupported by the Regional Board's own findings.

Invoking §13267(b) of the Water Code, the Order requires me to submit certain reports on penalty of substantial fines. Order, pp.6-8. To be required to provide reports under §13267 of the Water Code, a person must be a discharger. In reviewing a water quality monitoring and reporting order entered by a Regional Water Quality Control board pursuant to section 13267, the State Board first must determine if the party to whom the monitoring order is directed has discharged, is discharging, is suspected of discharging, or proposed to discharge waste. *In the*

Matter of the Petition of Pacific Lumber Company and Scotia Pacific Company LLC, Order No. WQ 2001-14 (SWRCB 2001), p. 10. Although the Order alleges that I caused or permitted discharge of waste, it fails to support this conclusion with any evidence pertinent to my involvement. Thus, the Regional Board has failed to fulfill the requirements of the last sentence of §13267(b)(1):

> In requiring those reports, the regional board shall provide the person with a written explanation with regard to the need for the reports, and shall identify the evidence that supports requiring that person to provide the reports. (Emphasis added.)

The evidentiary rule of Gov. Code §11425.50(c) provides that the factual basis for a decision shall be based exclusively on the evidence of record in the proceeding. There is no evidence in the record establishing that I in any way threaten to cause or permit discharge of waste into the waters of the state, or that waste probably will be discharged.

Even if one were to conjecture that some contaminated soils remain in the ground, the conclusions reached do not follow from the alleged beneficial uses of Findings ¶14 and ¶15. The site is in a commercial zone of downtown Crescent City, where potable water is furnished by a public system drawing water from an aquifer beneath the Smith River, about 10 miles north of the city. Affidavit ¶31. The Order fails to cite any specific domestic, agricultural, or industrial use of groundwater in the vicinity of the site that might reasonably be supposed to be impaired or endangered by any residual contamination. There is no reasonable basis for supposing that any of the beneficial uses of the waters of Crescent City Harbor would be adversely affected by any possible residual contamination. Merely listing possible beneficial uses of groundwater and beneficial uses of the surface waters of the harbor does not support a conclusion that any actual uses are impaired or endangered.

The fact that the Regional Board has taken no action for a decade is itself evidence that it judged that there is not a problem of discharge or threatened discharge. Rather, the action against me appears timed to support an action taken by Crescent City, which does not like the appearance of the site, and which has fraudulently and vindictively charged me with a felony, alleging that I knowingly polluted the waters of the state, in an effort to intimidate me and to break my resistance to accepting responsibility and liability for the wrongdoing of others.

Because Water Code §13304 is not a strict liability provision as to landowners, the Regional Board had the burden of proving that I was liable as a discharger. Evid. Code §115. It cannot meet this burden with surmise and speculation. Because it did not show that I ever contributed to any discharge or that there is any ongoing discharge or probability of discharge, it did not meet its burden.

A. **Even if Petitioner were a discharger within the meaning of Water Code §13304, he is exempt from liability under the Health and Safety Code §25548 *et seq*.**

(2) **California and federal law generally exempt lenders from liability.**

Although owners or operators of property where a discharge is occurring or threatens to occur are ordinarily liable, the lender exemption provides an important exception: when a lender forecloses his security interest and becomes owner of such property.

After adoption of CERCLA, there was a period of uncertainty as to whether lenders could

make loans on contaminated property without being held liable. Concerns within the lending community over liability induced caution in lending for inner city development and may have increased the costs of using lending institutions as trustees, conservators, and executors. See 26 *Env't Rep.* (BNA) 250 (1995). Congress addressed these concerns by amending CERCLA in 1996. It now specifically provides that the terms “owner or operator” do not include a "person that is a lender that, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect its security interest in the vessel or facility.” 42 U.S.C.A. §9601 (20)(e)(I). In particular, the term "lender" includes "any person (including a successor or assignee of any such person) that makes a bona fide extension of credit to or takes or acquires a security interest from a nonaffiliated person." See 42 U.S.C. §9601(20)(G)(iv)(V). The terms "owner or operator" do not include a person that is a lender that did not participate in management of a vessel or facility prior to foreclosure notwithstanding that the person actually forecloses on the vessel or facility and, after foreclosure, sells, releases, liquidates, maintains business activities, winds up operations, undertakes a response under 9607 (d)(1) of CERCLA, with respect to the vessel or facility, or takes any other measure to preserve, protect, or prepare the vessel or facility prior to sale or disposition if the person seeks to divest itself of the vessel or facility at the earliest practicable, commercially reasonable time, on commercially reasonable terms, taking into account market conditions and legal and regulatory requirements. 42 U.S.C.A. §9601 (20)(e)(ii). In Section 4 above, I have shown how I undertook to dispose of the Square Deal property following foreclosure at the earliest practicable, commercially reasonable time.

Following the Congressional action, the California Legislature decided to exempt lenders from liability for cleanups of contamination caused by leaking underground storage tanks. The legislation, SB 1285, which resulted in §25548-25548.7 of the Health and Safety Code, was fashioned to correct a perceived failure of previous law “to recognize that usually the credit or fiduciary relationship is not sufficiently related to the hazardous material contamination to warrant, as a policy matter, the imposition of liability on lenders and fiduciaries.” §25548(a)(3). It was surely evident to the Legislature, too, that holding lenders liable would be a sure way to stop lending on contaminated properties and even properties possibly contaminated, and that this result would tend to shift costs for cleanups to the public and increase the cost of borrowing generally.

Even though the Legislature apparently hoped that the lender’s liability exemption would help ensure continued flow of private capital to properties in need of remediation and redevelopment, its purpose is thwarted if the law is so administered that lenders are drawn into costly and time-consuming litigation.

§25548.2 of the Health and Safety Code is intended to provide a ‘safe harbor’ to lenders, subject to certain restrictions. It provides that a person acting in the capacity of a lender shall not be liable under any state or local statute, regulation, or ordinance, to the extent that the liability arises from the release or threatened release of hazardous materials in connection with the collateral property for a loan. The exemption applies, not only to lenders while a loan is outstanding, but also to property that is acquired by a lender through foreclosure. §25548.2(a)(2)(B).

The exemption applies to any lender “to the extent of the capacity in which that person maintains indicia of ownership primarily to protect a security interest or makes, acquires, renews, modifies, or holds a loan or obligation from a borrower. . . .” §25548.1(i). "Primarily to protect a

security interest" means

> that the indicia of ownership of a lender are held primarily for the purpose of securing payment or performance of an obligation. (2) "Primarily to protect a security interest" does not include indicia of ownership held primarily for investment purposes or indicia of ownership held primarily for purposes other than as protection for a security interest. A lender may have other, secondary reasons for maintaining indicia of ownership, but the primary reason that any indicia of ownership are held shall be as protection for a security interest.

§25548.1(m).

Two additional restrictions are germane to the issues in this case. The first pertains to the efforts made to dispose of the collateral property that a lender acquires following foreclosure:

> 25548.5. The exemptions set forth in Sections 25548.2 and 25548.3 shall not apply:
>
> (a) If, after foreclosure or its equivalent is conducted, the lender does not undertake to sell, re-lease property held pursuant to a finance lease, whether by a new finance lease or by substitution of the lessee, or otherwise undertake to be divested of the property in a reasonably expeditious manner, using whatever commercially reasonable means are relevant or appropriate with respect to the property, taking all facts and circumstances into consideration. For purposes of establishing that a lender is seeking to sell, re-lease property held pursuant to a finance lease, whether by a new finance lease or substitution of the lessee, or be divested of property in a reasonably expeditious manner, the lender may use whatever commercially reasonable means as are relevant or appropriate with respect to the property, or may employ the following means:
>
> (1) For purposes of this subdivision, the exemption set forth in subdivision (a) of Section 25548.2 shall apply following foreclosure or its equivalent, if, within 12 months following foreclosure or its equivalent, the lender does either of the following:
>
> (A) Lists the property for sale, re-lease, or other disposition with a broker, dealer, or agent who deals with that type of property. . . .
>
> (2) For purposes of this subdivision, the 12-month period shall begin to run from the date that the lender acquires marketable title to the property if the lender, after the expiration of any redemption or other waiting period provided by law, has acted diligently to acquire marketable title. If the lender has failed to act diligently to acquire marketable title, the 12-month period shall begin to run on the date of foreclosure or its equivalent.

Note that this provision creates a ‘safe harbor’ within the ‘safe harbor’ generally afforded lenders by specifying that a lender may establish that he has undertaken to divest himself of property acquired through foreclosure by listing the property for sale with a broker who deals with that type of property within 12 months of acquiring marketable title. Such action is not necessary to establish that a lender has undertaken to divest himself of the collateral property, but it is sufficient. The statute is designed thereby to relieve lenders from concern that others might second-guess their efforts to dispose of real estate owned by reason of foreclosure. Notably, the statute does not specify or limit the listed, or asking, price.

Another proviso that has become an issue in this case is that the lender's exemptions do not apply:

> 25548.5(k). If the lender made, secured, held, or acquired the loan or obligation primarily for investment purposes.

So, for example, lenders who negotiate an equity participation in making a loan presumably would not enjoy the exemption generally granted to lenders.

Based on the Order, it appears that the Board admits that I was a lender who might otherwise qualify for the exemption except, it is alleged, (1) I do not hold ownership primarily to protect a security interest; (2) I did not attempt to dispose of the property following foreclosure in an expeditious manner; and (3) I acquired the loan for investment purposes. The evidence cited in support of these allegations is inaccurate and out of context, and is coupled with misinterpretation of the law.

(1) **Petitioner acquired indicia of ownership to protect a security interest, not to invest in real property.**

The allegations that I do not hold indicia of ownership primarily to protect a security interest and that I acquired the loan primarily for investment purposes are two sides of the same coin. On its face, the proposition that I made the loan to invest in the property -- or for any reason other than to receive interest income and repayment of principal -- is absurd. Although I had once lived in Crescent City, until my arrest in December 2005 on Crescent City's charge that I knowingly caused hazardous materials to be discharged into groundwater, I had not been back since I sold my home property there in 1991 and moved to Washington, over 450 miles away. If I had any desire to make a loan with the purpose of investing in the collateral property, I surely would have chosen property that was closer to my home and that did not have the problems of the Square Deal property. See proposed Exhibit 27.

As discussed in Section 4, it has never been characteristic of my lending to use loans to acquire property. I seek real estate as collateral for the loans only because it is relatively reliable as backing for these loans, not because I intend to acquire it. The loan I made in the present case was presented to me as a "bridge loan," i.e., as a loan to provide short-term financing to span the time until the Trust could acquire permanent financing for its inventory and other needs. This is why its terms called for repayment in full in only six months. See Exhibit 1 and Affidavit ¶5. Although the borrowers had obviously been coping with financial difficulties connected with closing their facility in Crescent City and opening another building supply business in Reno, it was my hope and expectation, based on what they told me of their business operations and documentary evidence of their assets and liabilities and their ability to attract another lender to take me out, that I would be paid off as scheduled.

The Order's allegation that I did not hold indicia of ownership "primarily to protect a security interest" is based partly on an alleged misstatement of the value of my security interest at the time of the trustee's sale of the collateral property. Even if it were true that the trustee or I miscalculated the amount owing at the time of the trustee's sale, it would not show that I was not primarily concerned to protect a security interest. If I had been mistaken, and the value of the security interest was only two thirds of what I thought it was, the fact that I thought the value to be greater would not show that my purpose in holding indicia of ownership was not primarily to protect a security interest.

But I did not err in the amount claimed as owed at the trustee's sale. I did not overbid. I

greatly underbid, hoping that potential buyers might find it attractive to top my bid and cash me out. Nor have I erred, except perhaps to understate, the value of the security interest following the sale.

To see that this is so, and the Order errs, it is necessary to seek the meaning of the expression, "value of the security interest." This phrase occurs in §25548.5 in the context of the definition of "fair consideration," which is the amount of money that when offered by a bona fide prospective buyer of the collateral property must not be rejected by the holder of indicia of ownership if he is to retain the lender's liability exemptions:

> (l) If the lender outbids, rejects, or fails to act upon an offer of fair consideration for the property acquired through foreclosure or its equivalent, unless the lender is required, to avoid liability under federal or state law, to make a higher bid, to obtain a higher offer, or to seek or obtain an offer in a different manner. For purposes of this subdivision, the following terms shall have the following meaning:
>
> (1) (A) "Fair consideration" means the **sum** of all of the following less the amounts specified in subparagraph (B):
>
> (i) The **value of the security interest** or loan or obligation calculated as an amount equal to or in excess of, the sum of the outstanding principal, or comparable amount in the case of a finance lease, owed to the lender immediately preceding the acquisition of full title pursuant to foreclosure or its equivalent.
>
> (ii) **Any unpaid interest**, rent, or **penalties**, whether arising **before or after foreclosure** or its equivalent.
>
> (iii) **All reasonable and necessary costs**, fees, or other charges incurred by the lender incident to workout, foreclosure or its equivalent, retention, maintaining the business activities of the enterprise, preserving, protecting, and preparing the property prior to sale, re-leasing the property held pursuant to a finance lease, whether by a new finance lease or substitution of the lessee, or other disposition.
>
> (iv) The lender's costs incurred for any removal or remedial action, including but not limited to, response costs for response action taken by the lender under Section 107(d)(1) of the Comprehensive Environmental Response Compensation and Liability Act of 1980 (42 U.S.C. Sec. 9607(d)(1)).
>
> (B) In determining fair consideration, the following amounts shall be subtracted from the sum calculated pursuant to subparagraph (A):
>
> (i) Any amounts received by the lender in connection with any partial disposition of the property.
>
> (ii) Net revenues received as a result of maintaining the business activities of the enterprise.
>
> (iii) Any amounts paid by the borrower subsequent to the acquisition of full title pursuant to foreclosure or its equivalent. . . .
>
> (2) "Outbids, rejects, or fails to act upon an offer of fair consideration" means that the lender outbids, rejects, or fails to act upon within 90 days from the date of receipt of a written, bona fide and firm offer of fair consideration for the property received at any time after six months following foreclosure or its

equivalent. That six-month period shall begin to run from the date that the lender acquires marketable title, if the lender, after the expiration of any redemption or other waiting period provided by law, has acted diligently to acquire marketable title. If the lender has failed to act diligently to acquire marketable title, the six-month period shall begin to run on the date of foreclosure or its equivalent.

(3) "Written, bona fide and firm offer" means a legally enforceable, **commercially reasonable, cash offer solely for the property**, including all material terms of the transaction, from a ready, willing, and able purchaser who demonstrates to the lender's satisfaction the ability to perform. [emphasis added]

This language specifies that the value of a security interest is the sum of several items, including not only the principal amount, but also any unpaid interest, "whether arising before or after foreclosure." So, when the Order infers that the value of my security interest was the balance of the debt owned on the date it was due under the terms of the note, and that this amount "remains static and does not continue to accrue interest" (Findings, ¶12, p. 3), the Order ignores the plain language of the statute, which allows unpaid interest, both before and after foreclosure, to be part of the total value of the security interest.

Of course, the amount of interest depends not only on the length of time before the lender makes recovery of his security interest, but also on the terms of the note and deed of trust. The interest rate specified in the note from L.C. Bliss and Sons was 15% per annum, with payments due monthly. The note provides that when interest is not timely paid in monthly installments, it "shall thereafter bear like interest as the principal." Exhibit 1. Moreover, under paragraph 7 of the Deed of Trust, any amounts disbursed by me in protection of my security interest, "with interest thereon, at the Note rate, shall become additional indebtedness of Borrower secured by this Deed of Trust." Exhibit 2. Accordingly, the interest amount calculated for any given month is based on the original principal increased by any advances for taxes, attorney's fees, repairs, or the like, and any unpaid interest from a prior month (but also decreased by any rent or other payments received).

In lieu of making use of the definition of the value of a security interest found in the section of the Health and Safety Code pertaining to the lender's liability exemption, the Order tries to capitalize on an irrelevant distinction between judicial and nonjudicial foreclosures found in the Code of Civil Proceedings. While it is true that in a nonjudicial foreclosure a lender cannot seek a deficiency judgment, in such a foreclosure a lender can seek not only the unpaid balance and any accrued interest to the date of maturity of the note, but also any unpaid interest subsequent to the maturity date, and penalties such as late charges, as well as attorney's fees and trustee's fees and other reasonable expenses to protect the collateral property and a lender's security interest in it. In short, in a nonjudicial foreclosure he can bid, without exceeding the amount he is owed, the equivalent of what is defined as a fair consideration in §25548.5.

At least under the terms of most notes and deeds of trust there is provision, as there was in the Note and Deed of Trust involved here, that the borrower promises to pay interest on the principal amount from the date the loan is made "until paid." Exhibit 1.

At a trustee's sale, a lender may bid less than the sum owed, the same as the sum owed, or more than the sum owed, though obviously he would have no reason to bid more unless he wanted to own the collateral property for investment purposes. The Order inconsistently says that in bidding $585,000 at the trustee's sale I bid the full amount of debt owed, but also that the

amount of the debt owed was $581,263.59. See Findings ¶12(a). If all I had been owed was $581,263.59, then the amount I actually bid would have been for more than the full amount owed. But the Order miscalculates the amount owing at the time of the trustee's sale. The actual amount owed, using the standard method of calculation employed by professional trustees and consistent with Civil Code §2924 was:

Principal amount of the loan	$560,000.00
Interest from August 11, 1996 (522 days @ 230.13/day)	$120,127.86
16 months of late charges @ $420/mo.	$6,720.00
Property tax advance on April 10, 1997	$12,614.05
Interest on tax advance of 4/10/97 (280 days @ 5.18/day)	$1,450.40
Property tax advance on December 10, 1997	$6,065.39
Interest on tax advance of 4/10/97 (36 days @ 2.49/day)	$89.64
Attorney's fees paid	$500.00
Trustee's fees paid on foreclosure	$4,997.17
Total secured debt on date of foreclosure (1/15/98)	$712,564.51[1]

The method in the Order for calculating the balance owing, the security interest, erroneously understates the balance by more than $130,000. If this method were correct, it is safe to say that there would be few large loans in California, given the inherent delays -- and added potential delays when bankruptcy is filed -- between the time of default and the time of a trustee's sale.

Because I really wanted not to become the owner of the collateral property, I greatly underbid the amount of my security interest. I could not know in advance whether there might be other bidders at the sale, and did not attend the sale, but instructed the trustee in advance to enter my bid of $585,000. Affidavit ¶6. If any other bidder had bid even a cent more than this amount, he would have become the owner of the collateral property. So little did I want to acquire this property that, based on the preceding calculation, I was willing to accept $127,564.50 **less** than the amount I was owed.

So, while the Order is correct in stating that the statute requires that to be considered a lender one must maintain indicia of ownership primarily to protect a security interest and not for the purpose of investment, every action of mine, whether one looks at the pattern of my loans generally or at the amount I bid at the trustee's sale of the collateral property in this case, is consistent with my desire to be repaid under the terms of the loan and to protect my security interest (or at least as much of it as I thought I could salvage), and not to invest in the property.

---

[1] In an earlier estimate, I used the Trustee's fees as stated on its Payoff Status Report of 2/25/97, which were $7,653.40. Proposed Exhibit 24. Because I actually took title to the property, the trustee discounted its fees, a discount reflected in the figure I have used in the present calculation. I also had used a 360-day year to calculate per diem amounts of interest, which I have now adjusted to use the 365-day year employed by the trustee. Although I do not now have a calculation by the trustee of the amount owing as of the date of sale, proposed Exhibit 24 shows $615,550.66 owing me as my security interest as of February 25, 1997, 11 months prior to the date of trustee's sale. When interest, taxes, and attorney's fees are added to this amount, the calculation above is the result.

(1) **Petitioner undertook to dispose of the collateral property as required to qualify under the lender's liability exemption.**

To qualify for the lender's liability exemption under California law, I undertook to dispose of the property expeditiously, following the language of the statute. In concluding that I do not qualify for the lender's liability exemption, the Regional Board read additional requirements into the statute that are unsupported by the statute's text or purpose.

The statute does not specify any asking price or any amount short of a fair consideration that a lender is obliged to accept if the lender's liability exemption is applicable. So long as a lender holds indicia of ownership **primarily** to protect his security interest, nothing in the statute precludes him from wishing for, asking, or accepting an offer higher than that which would provide him a minimal fair consideration.

Notably, §25548.5(a) does not require that lenders dispose of their property expeditiously, only that they **undertake** to do so in a reasonably expeditious manner. The statute expressly provides two alternatives by which to accomplish the required undertaking. I followed the first alternative: listing the property for sale within a year of foreclosure with a broker who deals with that kind of property. Uncontroverted evidence of the listing was presented to the Regional Board, and was not challenged in the Order. See Findings, ¶11 and Exhibit 5.

A timely listing the property for sale with a broker who dealt with that kind of property qualifies me for the lender's liability exemption. If the legislature had intended to set a limit on the asking price, or to impose other restrictions on sale of the property it would have written §25548.5 to accomplish as much.

When I listed the property for sale, I was faced with a complex situation and no clear path to protect my security interest. The collateral property consisted of eleven parcels, only one of which had a problem of contamination. My early marketing efforts in 1998 had given little hope that the collateral property could be sold as an entirety in such a way as to protect my security interest.

The Order falsely alleges that I asked "nearly double" the value of my security interest. Findings, ¶12(a). As discussed above, the security interest, as represented by the "fair consideration" defined in Health and Safety Code §25548.5, had risen to more than $854,000 by the time of the listing. See Exhibit 15. Since the method of calculating interest is not specified in the statute, the value of the security interest, or a fair consideration, is a function of the terms of the note and deed of trust. If a note or deed of trust calls for unpaid interest and advances to be added to the balance in succeeding months, as was specified in my loan to the ESOT, then such compounding is legitimately part of a fair consideration.

In response to a query from David Boyers, an attorney representing the Regional Board, I prepared a spreadsheet showing a rough calculation of fair consideration. Exhibit 15. The first balance, i.e., fair consideration, shown is for the amount owed as of August 11, 1996, because even though the loan began in May, the borrower had made the required interest-only payments through August 11. In other words, the balance owing at the point that the spreadsheet begins was the same as the original principal amount, $560,000. Once default occurred on the payment due Sept. 11, neither the borrower nor the bankruptcy trustee made any further payments to me. Affidavit ¶5.

Monthly payments under the note were due on the 11th of each month. In the spreadsheet I have adopted an accounting convention of assigning any expenses/advances incurred as well as

any payments received to the 11th of the month in which these were paid or received. So, for example, an advance made or payment received in April, whether before or after April 11, is reflected in the balance shown for April (strictly, for April 11). I used another approximation, an averaging convention, in the case of rent income. I have taken the gross rents received in the course of a year, subtracted utilities I paid and other minor expenses such as postage or service of a three-day notices, and stated the adjusted net income for the year as received in June of that year. I have made no adjustment for depreciation. Property tax advances and other sizable advances, including various repairs and cleaning expenses, have been allocated to the month in which they were incurred.

The initial payment of property taxes, in April, 1997, included back taxes from the first installment due in December, 1996, left unpaid by the borrower. Thus, the income figures shown for June of each year (except for 2005) do not reflect true net income, since the major expenses are included under the column for advances. The property taxes are shown as advances in April and December of each year.

My calculation of around $854,000 owing in January 1999, at the time of the listing, does not take late charges into account. It appears that these, too, are legitimately part of a fair consideration, given the reference in §25548.5 (l)(A)(ii) to "penalties" as part of the total value of the security interest. If penalties in the form of late charges were added to the sum, but not accruing interest, then another $11,760 might be added to the sum representing the value of the security interest, or a fair consideration.

Itemized advances/expenses are shown in a separate spreadsheet submitted to Mr. Boyers. Exhibit 16. They are generally documented by the copies of invoices I provided to Mr. Boyers (Exhibit 17), except for two initial cleaning expenses charged by Sandra Buchanan for which she submitted no written invoice. The amounts shown as paid to Walt Kreiter do not equal the amounts shown on his work orders because he took part of his payment as an exchange for space in a garage on site that I made available to him for storage. The work shown in his work orders on 1139 5th St. was on the small house that is on the same parcel as the large building known as the Square Deal building, or 475 K St. Two items listed separately on the itemized spreadsheet are added together in the main spreadsheet entry for April, 1999.

When I signed listing agreements in January, 1999, I had already accepted an offer of $239,200 for purchase of the largest of the lots that were part of the collateral property, the block between 6th and 7th St. See Exhibit 6. The listing prices for the remaining parcels were as recommended by the listing broker: $475,000 for the two parcels comprising the block on which the lumberyard and two houses were located; $145,000 for the two parcels in a little more than half of the block to the north, between 5th and 6th St.; and $295,000 for the six contiguous lots on Northcrest Drive. These figures total $1,154,200. If the parcels had sold instantly for the asking prices, then, after commissions and closing costs, I estimate that I might have realized about $1,070,000, about a 25% premium above the calculated fair consideration. If I had received the full asking price, but the property had taken a year and a half to market successfully, I would have received only about the amount of a fair consideration at that time, considering the accrual of interest and advances for taxes. If, as I hoped, the property sold within six months for an average of 80% of asking price (plus $239,200 for the parcel I had already agreed to sell), then I would have netted about $898,000, a bit less than what is deemed a fair consideration, when accrued interest is included.

Consequently, far from asking "nearly double" the amount of a fair consideration, I asked about 25% more, with the hope that after allowance for marketing time, commissions, and closing costs, I might come close to recovering a fair consideration. Given that real estate is normally sold for a negotiated price, it is rare, except in some overheated residential property markets, for a property to attract an offer as high as its listing price. Usually, a prospective buyer offers less, sometimes much less. He is likely to be offended if the seller is not prepared to counter with an offer to sell for less than the listing price (though perhaps more than the opening offer). So, it is ordinarily not expeditious to list a property for the lowest price the owner would accept. In other words, if one is trying to obtain a fair consideration, it would not be expeditious to ask only the amount of a fair consideration.

Moreover, in the present case, given the difficulty of selling all 11 parcels of the collateral property in one transaction, I faced the problem of setting prices for individual lots, or at least contiguous groups of lots, without knowing what these might bring. Although the listing broker had made recommendations, no one could know what each of the properties might bring, given the adverse market conditions discussed above. Under these circumstances, it was reasonable to set listing prices at the low end of the range of estimated fair market value, as determined by the listing broker. If I had been so lucky as to attract a buyer quickly for part of the property and the buyer had been willing to pay the full listing price or something close, then I could have adjusted the listing price for the other collateral property, if it appeared that lowering the price would attract more buyers and yet leave me with the potential to recover a fair consideration for the the property.

The Regional Board presents neither evidence nor any reasoned analysis to show that I might have disposed of the property more quickly for close to a fair consideration by any other strategy than I followed. Nor does it allege that I turned down any offer of a fair consideration. If I had persisted in attempting to sell the whole in one transaction, I believe I would have made even less progress in recovery of the amounts owed me than by the course I chose. Alternatively, if I had determined the fair consideration of the whole and then attempted to assign a pro-rated value to each of the parcels, so that the sum of the asking prices was equal to what might have provided me with a fair consideration if the property had sold instantly, then I would certainly not have recovered a fair consideration, and probably would have fallen far short, given that under local market conditions a series of quick sales of such illiquid property was unrealistic.

Certainly there is no evidence that any potential buyer was deterred from making an offer simply because the asking price was more than he was willing to pay. The fact that some offers have been so low as to be ridiculous -- such as the $2,000 recently offered for A.P. 118-160-03 -- and that others have incorporated unacceptable terms -- such as the offer for the whole that included only a $1,000 down payment, where I would have been required me to carry paper for the remainder -- shows that neither serious buyers nor those not so serious have been deterred by the asking price from offering what they were prepared to pay, even if that was much less than the asking price. See Exhibit 8 and proposed Exhibit 26.

The main spreadsheet gives an approximation showing that no bonafide offer I have received and rejected comes close to being an offer of fair consideration as defined in the statute. See Exhibit 15. It does not purport to be exact or comprehensive, though it includes payments, whether in the form of rent or sales of the two parcels sold, partially offsetting the growing balance of principal and interest. But I believe my calculation results in an estimate for fair

consideration below that which would be allowed with more exact calculation under the statute. For example, I have not included any calculation of late charges, even though I am entitled to include these as "penalties" under §25548.5(l)(1)(A)(ii).

While there is always room to speculate about what might have happened if I had acted differently, second guessing by public employees with no experience in lending or real estate sales is not valid evidence. The Board has erred in arrogating to itself the authority to override the statutory text on the basis of its notion of the value of a security interest, a notion unfounded in statute, case law, or other legal authority. In administering and interpreting the statute, the Board's task is to apply the text, not to improve upon it to its liking, or to the liking of its staff.

8. Copies of the Petition

A Copy of this Petition has been sent to the Regional Board. To the best of my knowledge and belief, others named as dischargers have been dissolved as corporate entities. I have sent a copy to the actual discharger, Robert M. Bliss.

9. Issues not presented to the Regional Board

The main issues addressed in this petition were not presented to the Regional Board before the Board acted because the executive officer acted without a hearing or apparently full consideration of the evidence I submitted to attorney David Boyers. I have had no prior opportunity to respond to the allegations contained in the Order. In e-mails to me, Mr. Boyers asked various questions, which I answered to the best of my ability. But he did not make the specific charges that are made in the Order or ask questions that would lead a reasonable person to anticipate the particular evidence and argument required to rebut the charges therein.

The suggestions that I somehow did not make the loan with the intention of being repaid, but with the intention of investing in contaminated property, that I miscalculated the amount due and overbid at the trustee's sale, and that I did not really attempt to sell the property expeditiously are so preposterous and/or naive that I could not have anticipated needing to respond to them. Because these allegations were not made to me until they appeared in the Order, I have not been able to present evidence and argument in rebuttal until now.

10. Request for stay

Pursuant to 23 C.C.R. §2053 I hereby request a stay of the Order of May 10, 2006, No. R1-2006-0058. The facts stated herein are supported by my accompanying declaration in the Affidavit, especially ¶31 and ¶32. This request is based on the following reasons:

A. **Petitioner's constitutional rights to due process will be violated if a stay is not granted.**

Administrative procedures must afford constitutional due process protections. *Mathews v. Eldridge*, 96 S.Ct. 893, 902 (1976). The fundamentals of due process include notice and an opportunity to be heard. *Gamet v. Blanchard*, 91 Cal.App. 4th 1276, 1286 (2001). Given that I have not yet been given a hearing before either the Regional Board or the State Board, it would be grossly unfair and a violation of my constitutional protections not to be granted a stay prior to a hearing.

A. **Petitioner will be substantially harmed if a stay is not granted.**

The State Board has recognized that "incur[ring] additional costs to comply with the

tasks if a stay is not issued" constitutes substantial harm to a petitioner, for purposes of issuing a stay order. *In the Matter of the Petition of Fairchild Semiconductor Corp. and Schumberger Technology Corp.*, Order No. WQ 89-5 (SWRCB 1989).

If I comply with the requirements set forth in the Order I will suffer a substantial expense. Regional Board staff person Kasey Ashley has informed me that the Board did not even send a copy of its order to the other parties named as dischargers. She apparently believes, as I do, that these corporations no longer exist. The persons actually responsible for the discharges have been ignored in the Order. Consequently, there are no other named dischargers with whom to share the expense of compliance. If I am obliged to pay for the cost of the cleanup I have been told by Christopher Watt, R.G., whose firm LACO Associates supervised all previous work at the site, the cost would be likely to range between $150,000 and $300,000. He could offer no assurances that the cost would not exceed $300,000. He indicated that even the initial investigation would cost more than $10,000. See Affidavit ¶32. Plainly, if I suffered this cost or the further cost of the cleanup and abatement, I would be substantially harmed.

Moreover, the Order requires almost immediate action, beginning with a workplan to characterize the soil stockpiled on site due by June 15, 2006. Order, p. 7, ¶4. Even if cost were not a consideration, it would not be reasonable to require me to employ qualified consultants and to have them complete work in this time frame. But there would be substantial cost, and depending on the results of this characterization and two other studies required in the Order, I might incur additional substantial costs. If the State Board or the courts ultimately determine that I was improperly named in the Order, all of these costs would have been incurred without cause.

As someone who never owned or operated a facility with leaking underground storage tanks, I apparently am not eligible to receive partial reimbursement for cleanup and abatement costs through the state fund for that purpose. While Mr. Boyers has suggested that Mr. Bliss might assign his rights to me, no one in a state agency has confirmed even that Mr. Bliss would be eligible to apply for reimbursement if he undertook the cleanup himself, given that the original application was undertaken in the name of a corporation and subsequently allowed to lapse. Further, Mr. Bliss has indicated to me a total unwillingness to participate in any further cleanup. Affidavit ¶32.

A. **Neither the public interest nor the interests of other persons would be substantially harmed if a stay is granted.**

The site in its present condition does not cause substantial harm to anyone except myself, in my efforts to recover amounts owed me. With the tanks long gone, there is no source of further contamination. The contaminated soil removed from around the tanks is safely stored on an impermeable surface, sheltered from the elements by both a roof and a plastic tarp. The City of Crescent City is served by a public water system drawing its water from an aquifer below the Smith River, about 10 miles north of the city, and the downtown area in the vicinity of the lumberyard is not known to have any operating wells. The nearest surface water, in the Crescent City Harbor is so far away that it is unlikely that any measurable contamination would ever reach it, even if some traces of petroleum migrated offsite. See Affidavit ¶31.

The fact that the Regional Board has not pursued the responsible parties and is only now, after ten years, attacking the lender, itself attests to the lack of substantial harm if a stay is granted. If action has in effect been stayed without a request for a decade, it can do no harm to stay action until the legal and factual issues can be properly resolved.

A. **There are substantial questions of fact and law regarding the disputed action.**

In the previous sections I have demonstrated substantial questions of both fact and law, disputing that I am a responsible party, a discharger, or a liable person, but showing that responsible parties have been omitted from the Order. It would be a fundamental miscarriage of justice if I were required to comply with the Order before these questions can be properly resolved with due process.

The fact that I have raised meritorious arguments in my petition for review strongly supports the issuance of a stay in this case. See *Langford v. Superior Court,* 43 Cal. 3d 21, 28 (1987)(evidence that a party is likely to succeed on the merits supports the issuance of a preliminary injunction). A stay is needed to ensure that I am not unfairly subject to the substantial costs of compliance with the Order. Accordingly, I request that the Order be stayed at least until the State Board holds a hearing and reaches a decision on the merits of my petition for review.

11. Request for hearing

Pursuant to §1058 of the Water Code and 23 C.C.R. §2050(3)(b), I hereby request that the State Board conduct a hearing to consider testimony, other evidence, and argument. Although I submitted evidence to Mr. Boyers in response to his questions, it is unclear whether all of this material has been or will be included in the record of the Regional Board. If there turns out to be disagreement about the evidence of record, this is in itself reason for a hearing. Further, given that there has not yet been any hearing in this matter, no testimony subject to cross-examination has been possible, nor any opportunity for rebuttal to the disputed allegations contained in the Order. The allegations that I am not a lender within the meaning of the statute, that I did not expeditiously undertake to dispose of the property as required by the statute, and that I acquired the property for investment purposes were not addressed to me prior to the Order, and were not conceived by me as possible objections to granting me the protections granted to lenders under §25548.2 of the Health and Safety Code. The specific issues relating to whether I qualify for the lender's liability exemption, which only came to my attention when I received the Order, would be appropriately addressed at a hearing. Although some evidence previously submitted is germane to these issues, other evidence is available and would be presented at a hearing, including my own testimony.

12. Request to present additional evidence

Pursuant to 23 CCR §2050.6 I hereby request that the state board consider evidence not previously provided to the Regional Board. The evidence in question will supplement evidence I submitted to Mr. Boyers, but was not previously submitted because, as noted in my request for a hearing, I could not have conceived that the Board would dispute that I was a lender, as distinct from someone who makes a loan in order to invest in property. Nor did it seem plausible that anyone would contest that I had attempted to dispose of the property expeditiously, given that I had submitted evidence of the listing agreements (and sale agreement) that covered the collateral I had acquired in the trustee's sale. The evidence that I seek to add to the record is essentially rebuttal evidence that would have been properly admitted to a hearing before the Regional Board, except that the Regional Board chose to handle this matter through an administrative

order, without benefit of a hearing or any full opportunity for me to address what turned out to be the Board's chief concerns relating to whether I qualified for the lender's liability exemption.

As Appendix B, I attach both a list of exhibits that I believe ought to be within the files of the Regional Board (because they are internal documents of the Board or because I submitted them to the Board through Mr. Boyers), and so part of its record of action, as well as several exhibits that I propose as supplemental to the record and that are relevant to rebut allegations that only appeared in the Order. Despite my efforts to obtain a full list of documents deemed part of the record, the Regional Board has not yet provided me with such a list. If any of the exhibits listed in Appendix B as part of the record is disputed and is not submitted by the Board, then I will ask permission to add such evidence to the record. Here I provide specific reasons for adding several documents useful in rebuttal of false allegations in the Order, identified with proposed exhibit numbers used in section II of Appendix B:

(19) Affidavit of John E. Diehl, dated June 5, 2006. This affidavit consists mainly of factual testimony submitted previously to Mr. Boyers, either in an earlier affidavit or in e-mail correspondence. I have added some details pertinent to the specific allegations, which emerged only in the Order, that I held the indicia of ownership, not to protect a security interest, but for investment purposes and that I failed to undertake to dispose of the property as required to qualify for the lender's liability exemption.

(20) Consolidated Balance Sheet from L.C.Bliss and Sons Livestock Corp., dated Jan. 31, 1996, presented to John Diehl prior to his loan in 1996. This evidence helps to corroborate that I made the loan to a company that showed signs of being able to repay it.

(21) Letter from Princeton Capital to Jeff Frank indicating a willingness to begin processing a loan application for L.C.Bliss and Sons Livestock Corp., dated April 11, 1996. This evidence helps to corroborate that I was presented evidence that my loan would function as a bridge loan and would be soon repaid, which bears on the question of whether my purpose was to lend money to obtain income or, instead, to make an investment in contaminated property.

(22) Notice of lumberyard for sale or lease, prepared by John Diehl, summer of 1998. This evidence helps to show that I was not holding indicia of ownership for investment purposes, but primarily in an effort to recoup what I was owed through sale of the collateral property.

(23) Telephone bills showing calls to Eureka and Gold Beach lumberyards in 1998. This evidence helps to corroborate, contrary to findings in the Order, that I was undertaking to dispose of the collateral property expeditiously by interesting out-of-town lumberyards in opening a store in Crescent City.

(24) Status Report on foreclosure by trustee Preferred Trustee Services dated Jan. 29, 1997. This document shows the amount owed on the Note about 11 months prior to the time when, following bankruptcy proceedings, I was finally able to foreclose, and so shows that the allegations in the Order relating to the proper method of calculating a security interest are erroneous, and that the amount I bid at the trustee's sale was substantially less than the amount owed me.

(25) Photo showing soil stockpiled on site of Square Deal Lumber under roof of shed. This evidence shows that the stockpiled soil at the site is safely under a roof, not an awning as alleged in the Order.

(26) Offer to purchase A.P. 118-160-03 for $2,000 by Land Value Group of Beaverton, Oregon, dated April 6, 2006. This evidence, which obviously was not available when I

corresponded with Mr. Boyers last year, helps to show that potential buyers will offer what they please, regardless of the asking price, and that my efforts to attract buyers continues to produce offers, even if not always offers of fair consideration.

(27) Letter of Ted Souza to State Board, dated May 31, 2006. This letter from someone who has observed me for nearly thirty years helps to establish that my purpose in continuing to hold indicia of ownership in the Square Deal property is primarily to protect a security interest, not for investment purposes.

Dated: June __, 2006

Submitted by: _____

John E. Diehl pro se
679 Pointes Dr. W.
Shelton WA 98584
360-426-3709

APPENDIX A: Affidavit of John E. Diehl

I, John E. Diehl, under penalty of perjury under the laws of the State of Washington, hereby declare as follows:

1. I am 62 years old and am competent to testify to the facts contained herein. This Affidavit is based on my personal knowledge.

2. I have made more than 100 loans in the past twenty years, a majority in California, though I have not resided there since moving from the state in 1991. While I had once lived in Crescent City, until my arrest in December 2005 on Crescent City's charge that I knowingly caused hazardous materials to be discharged into groundwater at the Square Deal site, I had not been back since moving near Shelton, Washington, over 450 miles away.

3. Although none of my loans have been made with the intention of acquiring the collateral property, I can recall nine where I acquired the collateral through foreclosure. In every case I sold property so acquired as expeditiously as I could, given market conditions and my desire to recover what I am owed. I did so because I have no desire to own such property as an investment, even when I am not obliged, as in the instant case, to dispose of it as expeditiously as possible, subject to the requirement that I not turn down any bonafide offer to purchase for a "fair consideration."

4. Sometimes it has been possible to dispose of the real estate so acquired quickly; sometimes not. For example, a loan I made in 1990 was collateralized by a house in northeast Sacramento. It went into default, I was not able to work out a rescheduling of the debt with the borrower, and I foreclosed on the property in 1992. By the time I foreclosed, Sacramento was experiencing a sizable downturn in real estate values, brought about by the closing of a major air force base as well as other factors. I tried to sell the property quickly, but could not get a solid offer above $100,000 for a house that two years previously had been appraised at $135,000, and on which I was owed significantly more than $100,000. So, I maintained the place while waiting for a market recovery that would at least allow me to avoid a loss. It was not until 2001 that the market recovered enough for me to sell for a price that would result in my receiving more or less the equivalent of what the Health and Safety Code calls a "fair consideration" for a security interest.

5. In early May, 1996 I was approached by Lyndol Mitchell, a broker who was trying to find a loan for the ESOT that had purchased Square Deal Builders Supply and other assets of L.C.Bliss and Sons Livestock Corp. The manager, Jeffrey Frank, explained to me that he was lining up long-term financing for his inventory and other operational needs, but that he needed a bridge loan to carry him until the long-term financing could get approved. I learned that leaking underground storage tanks had been recognized as a problem at the time the ESOT acquired the property, but was assured by both the borrower and the former owner, Mike Bliss, that this problem was in the process of being addressed. On or about May 11, 1996, I made a loan of $560,000 to the ESOT. The borrower made three of the required monthly interest payments. Once default occurred on the payment due Sept. 11, neither the borrower nor the bankruptcy trustee made any further payments to me.

6. My loan was secured by a first deed of trust on 11 parcels in Del Norte County (one of which was encumbered with a life estate allowing continuing occupation of the house by Dorothy Bliss). Following the default I started foreclosure proceedings, which were blocked by a

bankruptcy filing. Because the bankruptcy trustee was not taking care of the collateral property and not even paying property taxes on it, I felt I needed to try to protect my security interest by seeking relief of stay and proceeding with the foreclosure. I was eventually able to put the property into a trustee's sale January 15, 1998. Even before the trustee's sale in January 1998, I had made contact with Mike Bliss to try to persuade him to buy out my note and/or to resume the cleanup at the lumberyard. I instructed the trustee to bid $585,000, even though this amount was more than $127,000 below the total I was owed at the time of sale, in the hope that other bidders might emerge at the sale and rid me of a headache. (I had urged at least one real estate broker in Crescent City – and probably more than one, though I cannot now remember others with whom I spoke – to try to locate clients willing to bid at the trustee's sale, letting them know that it would be available for less than the full amount I was owed.)

7. Using the method prescribed by the trustee to calculate the amount owing, which allows tax advances and legal expenses added to principal, and late charges, but not compounding of interest on interest in arrears, I was owed between $712,000 and $716,000 at the time of the trustee's sale (depending on whether the discount on the trustee's fee that I received when their were no other bidders at the sale and whether a 365-day year, instead of a 360-day year is used to calculate interest) and could have entered at least $712,564.51 as my bid without use of cash for any overbid.

8. The Trustee's Deed upon Sale was not recorded immediately because there was a problem with the title. I had made the loan with title insurance insuring that I had a first deed of trust. Yet, the trustee's sale guarantee showed a prior deed of trust still representing a lien on the property. Even before the sale, I had attempted to clear up the confusion, which was apparently created by the failure of a title company in Oregon to record a reconveyance affecting the collateral property. It took months after the trustee's sale for the trustee, Mesa Verde Financial, Inc., dba Preferred Trustee Services, working with a title company in Crescent City, which in turn had to work with the title company in Oregon, to obtain the needed reconveyance and then to record the Trustee's Deed upon Sale, which was recorded September 8, 1998.

9. Meanwhile, I had taken steps to dispose of the property expeditiously. The Square Deal store and lumberyard and a small house on the premises had been neglected and vandalized. I spent at least these sums to make the property more presentable to potential buyers: $1,700.00 to Crescent Roofing to replace a leaking roof on the small house (7/20/98); $5,565 to Crescent Roofing to repair leaks in the main building, replacing part of the roofing (8/20/98); $1,805.01 to Walt Kreiter for miscellaneous clean-up and repairs (3/16/98, 9/4/98, and 2/9/99); $373.00 to Sandra Buchanan for cleaning at the small house (10/5/98 and 4/1/99)); and $192.42 to Randy Payne for repair work (1/28/99). (There may have been other expenses at the time, but these are ones for which I have so far found records.)

10. Simultaneously, I explored what could be done about the contaminated dirt on site. I approached Mike Bliss, hoping to induce him to restart the clean-up he (and his family) had begun and promised to complete. Based on my personal observations as an occasional customer, Mike Bliss had been in day-to-day charge of the lumberyard and hardware store for most of the 15 years between 1976 and 1991 when I resided in Del Norte County. I hoped he would recognize his responsibility for the contamination and fulfill his commitment to clean up the site. I was unsuccessful.

11. Also, even before the buildings were made more or less "presentable," I did what I

could to interest those I judged the most likely prospects to purchase the property. For obvious reasons, my approaches included lumberyards in nearby communities, ranging from Gold Beach to Eureka, and even farther afield, to see whether they might have an interest in purchasing the property to open a branch in Crescent City. (Because by that time Crescent City was reduced to a single lumberyard serving the entire county, and because the buildings had been designed and used specifically for retailing lumber and hardware, it seemed to me not unrealistic to try to interest such businesses in buying the property.) During this time I also began an effort to attract potential buyers by listing the property for sale on the Internet.

12. Although in 1998 I was not successful in getting anyone to make an offer on the whole of the Square Deal property, I did receive and accepted an offer for the largest of the vacant parcels. Richard Brown made an offer of $239,200 on December 26, 1998 for A.P.#118-160-01. His offer was contingent on obtaining financing and ultimately depended on Mr. Brown's obtaining a contract from a federal or state agency for construction of a building on the site. When he was unable to win the contract, he was unable to obtain financing, and so did not close escrow.

13. Based on the interest of several of those whom I contacted in 1998, when I arranged formally to list the property with the Crescent City real estate broker who had originally persuaded me to take the loan, I excluded 8 prospects from the listing agreements, allowing me to sell to any of them without incurring a commission. (Of course, saving a commission does not usually mean savings to the seller, since the buyer will adjust his offer accordingly, but it does tend to promote a sale by encouraging the buyer to think that he can get the property at a reduced price.) The listing agreements covering the collateral property, both the site where there had been underground storage tanks and the uncontaminated vacant lots, were formally completed with Ming Tree Real Estate on January 8, 1999, though I had been working with the broker and owner, Lyndol Mitchell, to try to line up one or more buyers even before the foreclosure was complete. The listing prices were those recommended by the broker, representing his notion of a reasonable price, at or below fair market value. There were separate agreements covering (1) six contiguous parcels on Northcrest Drive, (2) two parcels located on K St. between 5th and 6th St., and (3) two parcels comprising the block between 4th and 5th St., improved by the Square Deal main building and two houses.

14. Although I thought otherwise when I initially tried to recall the listing arrangements, the square block between 6th and 7th St. (A.P. #118-160-01) was apparently not the subject of a listing agreement in January 1999 because it was the subject of Richard Brown's accepted offer to purchase at that time.(This was the parcel that eventually was split and sold partly in 2003 and partly in 2005 to Chetco Federal Credit Union.)

15. With one exception, I have never received an offer for the whole of the collateral property. Instead, I have mainly received offers for various parts, some of which I have accepted, some of which I have rejected. The first offer came from Jim Relaford "or nominee" in March 1999. I rejected the offer, but made a counteroffer, to which he made a counteroffer, which I rejected. Neither of his offers qualified as "bona fide and firm offers of fair consideration," as these are defined under §25548.5(l) because (1) they were not cash offers, and (2) they were not high enough to represent fair consideration for the collateral property. Because Mr. Relaford appeared to be seeking an agreement that would tie up the property without agreeing to any earnest money that would be paid to me if he failed to perform, I also believe these offers were

not "firm" within the meaning of the statute.

16. In March 2000 I rejected an offer for the whole of the collateral property from Valerie Barth "and/or assign." It was not a bona fide and firm offer of fair consideration because (1) it was not for cash, and (2) it was not high enough to represent fair consideration as this term is defined. (I would have had to carry all but $1,000 cash down payment on the $700,000 offer, meaning that I would have held a note for $699,000)

17. In April 2001 I accepted an offer from Mac and Karen Robertson for purchase of the two parcels between 5th and 6th St. on K St. The offer was subject to the buyer obtaining a financing package and permits for an automotive repair business. The Robertsons did not close escrow. I was told that they were unable to obtain the financing package they sought.

18. In January 2003 I accepted an offer from Chetco Federal Credit Union for half of the block between 6th and 7th St. The property sold in March 2003.

19. In September 2003 MP Financial Group, Ltd, accepted my counteroffer for the Square Deal Building for $450,000. The agreement would have required a lot line adjustment by which the residential structures on the block would be segregated and not sold. The offer was subject to a 45-day review during which the buyer might "determine in its sole discretion" whether to proceed or to terminate the purchase agreement without liability. The buyer terminated the agreement without explanation.

20. In August 2004 I accepted an offer from California Imperial L.L.C. for two parcels on Northcrest Dr. and parts of two other contiguous parcels. The buyer was granted 150 days after acceptance to complete his investigation, and then was granted an additional 30 day extension. In December 2004 California Imperial assigned its rights to Redwood Imperial L.L.C. The latter canceled the purchase agreement.

21. In January 2005 I sold the remaining half of the block between 6th and 7th St. to Chetco Federal Credit Union.

22. In April 2005 I rejected an offer from the Littlefield Trust for the block between 4th and 5th St., including the Square Deal building and grounds. The offer failed to qualify as a "bona fide and firm offer of fair consideration," because it was not for cash and was also not "solely" for the collateral property, since it was contingent upon my providing a service by assuming responsibility for the contaminated soils cleanup. Also, if I had agreed to accept financial responsibility (as well as every other contractual obligation entailed by contracting to complete the cleanup), the net consideration to me appeared likely to be substantially below fair consideration, based on rough estimates of cost obtained from an engineer familiar with the problem.

23. In April 2006 I rejected an offer from Land Value Group of Beaverton, Oregon for A.P. 118-160-03. The offer of only $2,000 failed to qualify as a bonafide offer of fair consideration because it was far below an amount equivalent to a fair consideration.

24. While the largest obstacle to selling the Square Deal property has been the petroleum-contaminated soil on site, there have been other factors as well. One of these was a lingering drop in real estate values brought about by overbuilding that occurred at the time of construction of Pelican Bay Prison, which caused a "boom" of sorts for several years in the local real estate market, but which led to a lack of demand when construction concluded.

25. A second factor was the long-term loss of employment in the backbone of the local economy, the lumber and fishing industries. The last mill operating in Del Norte County closed

during the ‘90s.

26. A third factor, particularly affecting the lumberyard, was the existence of a vigorous competitor. Another lumberyard/hardware store had played a significant role in driving the Square Deal lumberyard out of business in Crescent City (causing its owners to open a facility in what they believed was a more promising market in Reno). To some extent the presence of this successful competitor in a small town intimidated potential buyers who might otherwise have been tempted to revive the Square Deal lumberyard.

27. A fourth factor was the problem of acquiring needed sewer connections for development. This problem especially afflicted the lots on Northcrest Drive that were originally in the county, but have now been annexed to the city. For a period of several years, there was a cloud over any commercial development that required new sewer connections. Real estate brokers with whom I periodically discussed the local market expressed concern about what the relative unavailability of sewer connections was doing to the local economy.

28. A fifth factor was a negative attitude of city officials, particularly toward the Square Deal building. Mr. Mitchell, the broker, told me that on at least one occasion the former city manager gratuitously expressed his opinion to a potential buyer that the building had so many problems that it ought to be torn down. Those more knowledgeable than the former city manager, who has not, so far as I am aware, ever inspected the building, have concluded otherwise. Still, his attitude tended to discourage those who hoped to develop a business in the Square Deal building.

29. A sixth factor was the life estate that had been granted to Mrs. Bliss for the house adjacent to the retail store. This presented a complication not only because Mrs. Bliss had the right to retain control of the house and yard for the remainder of her life, but also because there was only one sewer connection that was shared by Mrs. Bliss’s house, a smaller residential unit, and the building that housed the lumberyard and hardware store. A buyer purchasing the property would have needed either to work out an arrangement with Mrs. Bliss or to have purchased at least one additional sewer connection from Crescent City and torn up the street to install it. Until Mrs. Bliss died in 2003 her life estate made the property less attractive to potential buyers.

30. A seventh factor, and certainly one of the most important, was the opening of a Wal-Mart store in Crescent City in the early ‘90s. I have now observed the impact of Wal-Mart on three small towns, in Crescent City, in my hometown of Newton, Iowa, and in the town nearest where I now live, Shelton, Washington. In each case – and elsewhere generally – the opening of a Wal-Mart in a small town has had profound and long-lasting consequences for downtown retailing. The immediate effect is to drive some stores out of business. The intermediate effect is to create empty store fronts downtown. Even when the local economy is not otherwise stressed, Wal-Mart causes local retailers and would-be retailers to hesitate and not to risk an investment that would entail in part competing with Wal-Mart. The impacts linger for ten years or more, though eventually most communities appear to adjust by creating a different mix of retailers and a different distribution of commercial development.

In support of my request for a stay:

31. Only the Square Deal property, among the several foreclosures with which I have had experience, has had any sort of contamination of which I am aware. The site is in a commercial

zone of downtown Crescent City, where potable water is furnished by a public system drawing water from an aquifer beneath the Smith River, about 10 miles north of the city. No one has presented me with any evidence showing probable harm to beneficial uses of groundwater based on the current condition of the site.

32. If I comply with the requirements set forth in the Order I will suffer a substantial expense. Regional Board staff person Kasey Ashley has informed me that the Board did not even send a copy of its order to the other parties named as dischargers, so there are no other named dischargers with whom to share the burden. The principal actual discharger, Robert M. Bliss, has indicated to me a total unwillingness to participate in any further cleanup. If I am obliged to pay for the cost of the cleanup I have been told by Christopher Watt, R.G., whose firm LACO Associates supervised all previous work at the site, the cost would be likely to range between $150,000 and $300,000. He could offer no assurances that the cost would not exceed $300,000. He indicated that even the initial investigation would cost more than $10,000.

Dated: June __, 2006 _____

John E. Diehl

STATE OF WASHINGTON
COUNTY OF MASON

On _____, 2006, before me, _____ a Notary Public in and for said county, personally appeared _____, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity and that by his signature on the instrument the person or the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal.

_____

APPENDIX B: List of Exhibits

I. Exhibits of record, Cleanup and Abatement Order No. R1-2006-0058

1. Note of May 11, 1996, showing John E. Diehl as lender and L.C.Bliss and Sons Livestock Corp. as borrower, in the amount of $560,000.

2. Deed of trust of May 11, 1996, showing John E. Diehl as Lender and L.C.Bliss and Sons Livestock Corp. as trustor, in the amount of $560,000.

3. Environmental Indemnification Agreement by which the Bliss family indemnified L.C.Bliss and Sons Livestock Corp. against environmental damages, dated Sept.1, 1994.

4. Trustee's Deed upon Sale, dated Jan. 16, 1998, showing $585,000 as the amount bid at the trustee's sale on Jan. 15, 1998.

5. Listing agreements by John Diehl with Ming Tree Realty, dated January 8, 1999, pertaining to all of the collateral property except A.P. 118-160-01 (which was then under an accepted purchase agreement).

6. Purchase agreement between John Diehl and Richard Brown for purchase of A.P. 118-160-01, dated Dec. 26, 1998.

7. Offer to purchase downtown properties by Jim Relaford "or nominee", dated March 2, 1999.

8. Offer to purchase all of the collateral properties by Valerie Barth "and/or assign," dated March 7, 2000.

9. Vacant land purchase contract between John Diehl and Mac and Karen Robertson for purchase of the two parcels between 5th and 6th St. on K St., dated April 30, 2001.

10. Final settlement statement showing sale by John Diehl to Chetco Federal Credit Union of north half of A.P. 118-160-01, dated March 26, 2003.

11. Purchase agreement between John Diehl and MP Financial Group, Ltd., for purchase of the Square Deal Building and most of the block containing it, dated Sept 5, 2003.

12. Purchase agreement between John Diehl and California Imperial L.L.C. for two parcels on Northcrest Dr. and parts of two other contiguous parcels, dated August 2004.

13. Final settlement statement showing sale by John Diehl to Chetco Federal Credit Union of southth half of (former)A.P. 118-160-01, dated Jan. 24, 2005.

14. Offer to purchase the block between 4th and 5th St. by the Littlefield Trust., including the

Square Deal building and grounds, dated April 26, 2005.

15. Spreadsheet showing approximate value of the security interest, 1996-2005, submitted by John Diehl to David Boyers in 2005.

16. Spreadsheet showing expenses connected with the Square Deal property, submitted by John Diehl to David Boyers in 2005.

17. Report of Lisa Bernard to Tuck Vath, dated May 7, 2003, regarding site conceptual model for Square Deal Building Supply, 475 K St., Crescent City CA.

18. Invoices showing expenses to repair and maintain the improvements on the Square Deal property.

II. Exhibits proposed to supplement the record

19. Affidavit of John E. Diehl, dated June 5, 2006.

20. Consolidated Balance Sheet from L.C.Bliss and Sons Livestock Corp., dated Jan. 31, 1996, presented to John Diehl prior to his loan in 1996.

21. Letter from Princeton Capital to Jeff Frank indicating a willingness to begin processing a loan application for L.C.Bliss and Sons Livestock Corp., dated April 11, 1996

22. Notice of lumberyard for sale or lease with option to purchase, prepared by John Diehl, summer of 1998.

23. Telephone bills showing calls to Eureka and Gold Beach lumberyards in 1998.

24. Status Report on foreclosure by trustee Preferred Trustee Services dated Jan. 29, 1997.

25. Photo showing soil stockpiled on site of Square Deal Lumber under roof of shed.

26. Offer to purchase A.P. 118-160-03 by Land Value Group of Beaverton, Oregon, dated April 6, 2006.

27. Letter from Ted Souza to State Water Resources Control Board, dated May 31, 2006.